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No. 88-1275

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

October Term, 1988

LEWIS R. CRIST,
RECEIVER FOR TRANSIT CASUALTY COMPANY,
*Petitioner,*

vs.

WAL-MART STORES, INC. AND
ALEXANDER AND ALEXANDER, INC.,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

## Brief In Opposition Of Respondent Wal-Mart Stores, Inc.

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## QUESTION PRESENTED

Whether the Court of Appeals correctly determined that, under Arkansas state law, where insurance policies are declared illegal due to the way the policies were structured by the insurance company, the receiver for the insolvent insurance company was barred from recovery by the common law doctrine of in pari delicto on a claim against its insured for additional premiums which were not part of the agreement between the parties.

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### STATUTES INVOLVED

Although the Petitioner cites a number of statutes dealing with workers compensation insurance in various states, none of these statutes is relevant to the issues presented in the Petition for a Writ of Certiorari. Petitioner apparently attempts to create at least an illusion that the laws from numerous states are in controversy here. In fact, however, only the state common law of Arkansas, which the Eighth

Circuit properly applied to those holdings challenged by petitioner Crist, is involved. Respondent Wal-Mart Stores, Inc. ("Wal-Mart")[1] objects, therefore, to Petitioner's inclusion of a vast number of statutes which have no bearing on this Court's consideration of the Petition.

## STATEMENT OF THE CASE

This action was brought in federal court by virtue of the diversity of citizenship of the parties involved. It concerns only issues of state law and policy.

In 1983, respondent Wal-Mart, headquartered in Bentonville, Arkansas, sought bids for obtaining compensation insurance coverage for its workers. (Pet. App. 4a). Offers were solicited through Wal-Mart's insurance consultant, Alexander & Alexander, Inc. ("A & A"). (*Id.*). One of the quotes submitted to Wal-Mart came from Transit Casualty Company ("Transit"), which is now represented in this litigation by its receiver, petitioner Lewis R. Crist. Transit offered to supply Wal-Mart's workers compensation insurance coverage for the coming 1983-1984 year for a total premium of $3.5 million. Wal-Mart accepted this bid. (Pet. App. 5a-6a).

As part of the bid process, Wal-Mart had supplied Transit with its projected payroll for workers for the coming year. Transit was to use this projected payroll in the issued policy. Transit had the responsibility for structuring the issued workers compensation policy, with this payroll, to comply with both the parties' premium agreement and Transit's own

[1]Pursuant to Supreme Court Rule 28.1, Wal-Mart Stores, Inc. informs the Court that it has no parent corporation and no subsidiaries other than wholly-owned subsidiaries. As to affiliates, it is in partnership with Cullum Companies, Inc. in Hypermart ☆ USA, a Texas general partnership.

insurance rate filings approved by the various states in which Wal-Mart had employees. (*See* Pet. App. 11a-15a). Wal-Mart reasonably expected that Transit would be able to issue a legitimate policy containing a $3.5 million premium cap. As the Eighth Circuit observed, "while a $3.5 million guaranteed premium was certainly a competitive offer, it was by no means unreasonably low in comparison to Wal-Mart's demonstrated loss history at the time." (Pet. App. 12a). To provide the coverage for $3.5 million, Transit would only need to use some of the many mechanisms, which are outlined in the Court of Appeals' decision, "by which filed workers' compensation rates could be legitimately adjusted to achieve a quoted premium." (Pet. App. 14a). As noted by the Eighth Circuit, "[d]evices such as premium discounts, retrospective rating, policy dividends, rate deviations and scheduled rating were available to legally reduce premium charges below what would have to be paid pursuant to filed rates." (*Id.*).

When Transit applied existing rates to Wal-Mart's estimated payroll, it obtained a premium price higher than $3.5 million. (Pet. App. 6a-7a). Rather than using available premium discounts or approved deviations to reduce this premium, however, Transit simply took the shortcut of depressing Wal-Mart's payroll as reported in the policy to artificially achieve the $3.5 million premium. (*Id.*). Transit sent the policy to Wal-Mart's insurance broker, A & A, who reviewed the policy and sent it to Wal-Mart. When Wal-Mart noted and questioned the reduced payroll in the policy, A & A assured it that Transit's procedure was common and appropriate.

In 1984, Transit again offered Wal-Mart coverage for the coming year at a guaranteed $3.5 million premium.

(*See* Pet. App. 7a). Again, Transit had the responsibility to structure a legitimate policy which complied with the parties' agreement. Again, however, Transit did not use any of the available mechanisms to validly obtain the $3.5 million cap. Instead, Transit took the shortcut of depressing Wal-Mart's estimated payroll to reach the $3.5 million premium. (*See* Pet. App. 7a).

Near the end of this second policy year, trouble arose between Transit and the reinsurers with which it had placed Wal-Mart's policy risk. (Pet. App. 7a-8a). As a result, these reinsurers stopped paying claims made against the Wal-Mart policies. (*Id.*). At that time, Transit suddenly was no longer satisfied with receiving only $3.5 million per year in premium. Instead, Transit unilaterally replaced the depressed payroll figure in the policies with the estimated payroll that Wal-Mart had given it earlier. Because of the filed rates for which Transit had not obtained deviations, this resulted in policies showing a higher premium. Even though it was Transit who had included the lower payroll as a shortcut in the first place to cover its failure to obtain the needed deviations and premium reductions, Transit now demanded that Wal-Mart pay the additional premium indicated in the revised policies. (*Id.*).

Wal-Mart refused to accede to Transit's demands for higher premiums than those agreed, and initiated a declaratory judgment action against Transit in the United States District Court for the Western District of Arkansas, seeking to enforce the $3.5 million premium agreements for the 1983-1984 and 1984-1985 policy years. Transit counterclaimed for over $18,000,000 in additional premiums that it claimed Wal-Mart owed. Wal-Mart initiated a third-party action against A & A for indemnity on Transit's counterclaim.

Prior to completion of the litigation, Transit was declared insolvent and petitioner Crist was appointed as receiver to continue the litigation on behalf of Transit. After a seven day trial, the matter was submitted to the district court, with all parties agreeing that the common law issues were governed by Arkansas law. The district court held that the policies proposed and submitted by Transit with the depressed payrolls violated the statutory law of the relevant states. (Pet. App. 71a-85a). The district court permitted Transit's receiver to escape the impact of this illegality, however, by concluding that Transit's agent, who had negotiated the agreement and structured the policies, did not have actual or apparent authority under Arkansas law to enter into the agreement with Wal-Mart in the first place. (Pet. App. 63a-71a). The district court further rejected Wal-Mart's argument that Transit's receiver, petitioner Crist, should not be permitted to benefit from Transit's wrongdoing by finding the Arkansas law of in pari delicto inapplicable. (Pet. App. 85a-88a). Accordingly, the district court allowed Crist to recover the additional premiums under the insurance policies and entered judgment for Crist for approximately $16 million, plus interest.

Wal-Mart appealed the district court's judgment to the United States Court of Appeals for the Eighth Circuit, which reversed after a lengthy analysis of the governing law of Arkansas. In its opinion, the Court of Appeals acknowledged the district court's holding that the insurance policies as issued by Transit violated the statutory laws of the relevant states. (Pet. App. 15a-18a). The Eighth Circuit also held, however, that Transit's agent did have apparent authority, under Arkansas common law, to make the premium agreement with Wal-Mart and issue the policies. (Pet.

App. 9a-15a). Echoing the district court's finding that there was "more than enough fault to go around in this case," (Pet. App. 20a), the Court of Appeals concluded that, under Arkansas law, Crist was barred by the doctrine of in pari delicto from benefiting from the wrongdoing of the party it represented. (Pet. App. 18a-22a). The Court of Appeals held that the policies could not be enforced, therefore, even if the correct payrolls were substituted.[2] It concluded that application of the doctrine of in pari delicto not only was required by Arkansas law, but also furthered the public policy underlying workers compensation insurance. (Pet. App. 22a).

## REASONS FOR DENYING THE WRIT

Crist's Petition for a Writ of Certiorari should be denied because the challenged decision of the Court of Appeals involves solely a question of Arkansas state law. Further, the Eighth Circuit properly interpreted and applied the law of Arkansas in this case. The law of Arkansas provides that Transit's receiver is barred from recovering damages from Wal-Mart by the doctrine of in pari delicto. Arkansas does not permit Crist to escape responsibility for the actions of Transit merely because of his receiver status. Finally, the Petition should be denied because, despite Crist's protestations to the contrary, no national interests are involved

[2]Crist erroneously asserts in his Petition that two agreements existed between the parties—an unenforceable premium "side agreement" and the "enforceable" policies. As the Court of Appeals observed, however, only one contract existed between the parties: for insurance coverage at a $3.5 million premium. In light of the manner in which the policies were ultimately structured by Transit, the entire contract between the parties was unenforceable under Arkansas law, which prohibited the severance of the one contract into two separate agreements. (*See* Pet. App. at 18a-19a). Crist fails to inform this Court that the "separate agreement" issue was decided against him by the Court of Appeals, and that it was so decided solely as a matter of Arkansas law.

in this case, which concerns a unique fact situation decided under Arkansas law.

## I.

### This Case Presents Only Issues Of State Law

Petitioner Crist challenges only the Eighth Circuit's holding that he was barred from recovering damages by the doctrine of in pari delicto. In his discussion of this challenge, however, Crist never reveals the most important aspect of the Eighth Circuit's holding: the Eighth Circuit's decision to bar Transit's receiver from recovering damages was based solely on the state law of Arkansas.

The parties in this action agreed, at all times, that the common law matters were to be governed by the law of Arkansas, where Wal-Mart is headquartered and where the action was maintained in district court. Thus, the district court applied Arkansas law in analyzing the issue of in pari delicto, (Pet. App. 85a-88a), as did the Eighth Circuit. (Pet. App. 19a-22a). The Eighth Circuit held that, under Arkansas common law, petitioner Crist, acting as Transit's receiver, could not recover from Wal-Mart when Transit was the party that structured the illegal policies. (Pet. App. 20a).

Even though Crist disputes in his Petition only this portion of the Eighth Circuit's decision, Crist disingenuously avoids mentioning that the disputed issue was governed by and decided solely under Arkansas law. This Court does not review, as a general matter, issues decided by intermediate courts of appeals solely on state law grounds. Indeed, at one time, Rule 19 of this Court provided that the Court would consider review of a decision of a court of appeals that resolved "an important state or territorial question in a way in conflict with applicable state or territorial

law." Sup. Ct. R. 19, 398 U.S. 1009, 1030-31 (1970). In its current Rule 17, however, this Court has excluded this category from those which it considers to present special and important reasons for review by writ of certiorari. *See* Sup. Ct. R. 17.

The Eighth Circuit's interpretation of the Arkansas law of in pari delicto certainly presents no special basis for this Court's departure from its normal reluctance to interfere with the interpretation of state law by federal appellate courts. *See, e.g., Huddleston v. Dwyer,* 322 U.S. 232, 237 (1944). Although Crist attempts to argue that the Arkansas law applied by the Court of Appeals conflicts with that applied in other jurisdictions, conflict among courts on questions of state law is not a reason for this Court to grant a writ of certiorari. *See Ruhlin v. New York Life Ins. Co.,* 304 U.S. 202, 206 (1938) ("As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts.").

Further, although Crist notes several times his disagreement with the Eighth Circuit's analysis of the facts, this Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925). At best, Crist raises issues of state law and policy. As this Court noted in *Huddleston v. Dwyer,* 322 U.S. 232, 237 (1944), however, "ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts." *Accord Butner v.*

*United States*, 440 U.S. 48, 51, 57-58 (1979).[3] Crist raises no issues worthy of this Court's grant of review.

## II.

## The Eighth Circuit's Decision Is Consistent With Arkansas Law

Not only does petitioner Crist fail to reveal that the Eighth Circuit's decision rests on Arkansas law, he completely fails even to suggest that the Eighth Circuit's decision incorrectly interpreted Arkansas law on in pari delicto. This failure is understandable, because the Eighth Circuit's interpretation and application of the law of in pari delicto is fully consistent with the law of Arkansas.[4]

### A. The Eighth Circuit Properly Held That Arkansas Law Required Application Of The Doctrine Of In Pari Delicto

As the Eighth Circuit concluded, "Arkansas has recognized and applied the doctrine of in pari delicto when parties to an illegal contract are equally culpable." (Pet. App. 19a). The Arkansas courts have held that no relief shall be granted to a party, such as Transit here, when that party was equally cognizant of the illegality of the contract. *See*

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[3]In *Butner*, this Court declined to review an issue on which the court of appeals had reversed the district court on a matter of state law, even though the Court was reviewing other aspects of the court of appeals' decision. This Court stated that it "did not grant certiorari to decide whether the Court of Appeals correctly applied North Carolina law," and "decline[d] to review the state-law question," even though the parties argued the issue "at great length." 440 U.S. at 51, 57-58.

[4]As noted above, previous Sup. Ct. R. 19 required that, at a minimum, the state law question be decided "in a way in conflict with applicable state . . . law" before this Court would consider granting review. Thus, even under the formulation which this Court has since discarded, Crist has failed to raise a question worthy of review because he does not — and cannot — show that the Eighth Circuit's decision is in conflict with the controlling Arkansas precedent.

*Long v. Mabry*, 250 Ark. 947, 470 S.W.2d 319, 321 (1971); *Womack v. Maner*, 227 Ark. 786, 301 S.W.2d 438, 439 (1957); *City Nat'l Bank v. First Nat'l Bank & Trust Co.*, 22 Ark. App. 5, 732 S.W.2d 489, 495-96 (1987); *see also Williams v. Wilson*, 181 F.Supp. 351, 354 (E.D. Ark. 1960).

Based on this undisputed Arkansas law, the Eighth Circuit correctly concluded that Transit's receiver could not recover from Wal-Mart where Transit had been the architect of the illegal policies. (*See* Pet. App. 18a-22a). It was Transit who had the responsibility to structure the premium agreement properly; it was Transit who failed to seek the necessary premium reductions; it was Transit who instead issued the policies containing the depressed payrolls; and it was Transit, and ultimately its receiver, who sought to profit from its illegal actions by demanding additional premiums from Wal-Mart. Agreeing with the district court that "there is more than enough fault to go around in this case," the Eighth Circuit properly held that Arkansas law barred Transit's receiver from reaping the profits of Transit's wrongdoing. (Pet. App. 20a).

Transit's receiver challenges the Eighth Circuit's application of the doctrine of in pari delicto, not by citing relevant Arkansas law, but by arguing that "public policy" requires that the insurance policies alone should somehow be enforced without regard to their illegality or the rest of the agreement between the parties. Quite contrary to the receiver's allegations, however, the Court of Appeals carefully considered the state law governing workers compensation insurance and determined that the goal of these laws would best be served by applying the doctrine of in pari delicto. Insurance regulations are aimed principally at regu-

lating the conduct of the insurers, not the insured. It is the insurance companies that have the greatest control over insurance policies and premiums and that have the greatest ability to cause harm when they fail to conform their insurance policies to the law in accordance with the legitimate expectations of insureds.

Here, the harm suffered came at the hands of Transit, the insurance company. The Court of Appeals properly held that, under the circumstances of this case, the public good was best served by holding the receiver to the consequences of Transit's acts. As the Court of Appeals noted:

> [W]e believe . . . that application of the doctrine [of in pari delicto] here would work to discourage insurers from permitting agents to quote premiums and structure policies in violation of state insurance regulations. Requiring the payment of greater premiums by Wal-Mart not only stands in direct conflict with the terms of the original agreement as the parties expected it to be carried out, but operates to reward Transit for structuring an illegal arrangement which it, as the insurer, was in the best position to prevent.

(Pet. App. 22a).

As the Eighth Circuit concluded, Arkansas law holds Transit's receiver to the consequences of Transit's bad acts. Far from undercutting the policy underlying workers compensation insurance laws, as the receiver suggests, the Eighth Circuit's holding is essential to carry out that policy. The public interest in controlling insurers requires that Transit and its receiver bear their share of the consequences of Transit's actions. Transit had the responsibility to issue policies that complied with the laws of the various states. Transit never made the effort. The supposed "public policy"

advanced by Transit's receiver would reward Transit and other insurers for inducing insureds to accept insurance based on premiums that the insurance companies never intended to justify. The Court of Appeals correctly identified and applied the controlling law and policy.

### B. Arkansas Law Does Not Permit Crist To Hide Behind His Receiver Status To Avoid Application Of The Doctrine Of In Pari Delicto

In his Petition for a Writ of Certiorari, Crist argues that the Eighth Circuit's rejection of his novel "shield" defense is contrary to the best interests of the public and ignores decisions from other jurisdictions which are on point. As already discussed, however, Crist does not and cannot argue that the decision of the Eighth Circuit is contrary to the law of Arkansas. Indeed, the existing Arkansas precedent rejects Crist's attempt to immunize himself from the acts of Transit.

Arkansas law provides that receivers are bound by the acts of the insolvent corporation in actions by or on behalf of the corporation. For example, in *Schneider v. O'Neal*, 145 F.Supp. 120 (E.D. Ark. 1956), *aff'd in relevant part*, 243 F.2d 914 (8th Cir. 1957), the district court for the Eastern District of Arkansas held that, under Arkansas law, a trustee asserting the rights of a bankrupt is responsible for the bad acts of the bankrupt. The district court applied, therefore, the doctrine of in pari delicto to bar the trustee from recovering damages.

On appeal from the district court's decision in *Schneider*, the Eighth Circuit affirmed the district court's holding that a trustee in bankruptcy is accountable for the acts of the bankrupt when the trustee is asserting the bankrupt's rights. The Court of Appeals reversed only the district court's find-

ing that the trustee had waived his ability to also assert the independent rights of the creditors — as opposed to the rights of the bankrupt — under Section 70(e) of the Bankruptcy Act. As the Eighth Circuit noted, the trustee would not be bound by the bankrupt's bad acts when the trustee is asserting only rights which the creditors have independent of the bankrupt. *See Schneider v. O'Neal*, 243 F.2d 914 (8th Cir. 1957).

Here, Crist represented the interests of Transit in pursuing this litigation and is bound by Transit's bad acts. Transit began the litigation and conducted much of the discovery. Crist only carried on the litigation in place of Transit after Transit was placed in receivership. Crist does not argue that he represents any rights that creditors of Transit themselves have against Wal-Mart independent of the rights of Transit. Indeed, it would be hard to envision any claim that the creditors of Transit could have against Wal-Mart, apart from the contract claim of Transit.

Crist did not and could not maintain this action for recovery of additional premiums on behalf of the creditors, as he asserts in his Petition. Indeed, it should be noted that the statute which Crist cites for the proposition that he represents the interests of creditors, Mo. Rev. Stat. § 375.-670, provides only that the receiver may administer demands by creditors on the insolvent's estate. It does not give the receiver the power to maintain actions against third parties in the name of the creditors. Thus, Crist is here merely continuing to assert the rights, if any, which Transit had when the litigation began. Any recovery it collected on Transit's behalf would have been added to the

estate, which must then be administered with the creditors in mind.

The Eighth Circuit correctly held, therefore, that, under Arkansas law, Crist must accept responsibility for the bad acts of the insurance company on whose behalf and in whose stead the litigation was conducted. Ignoring Arkansas law, however, Crist argues that the Court of Appeals should have immunized him from Transit's actions. Crist asserts that the Court of Appeals should have first extended the doctrine of *D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp.*, 315 U.S. 447 (1942), to the workers compensation insurance industry and then inserted it into Arkansas state law.[5] In *D'Oench*, this Court held that the Federal Deposit Insurance Corporation, which had acquired notes of an insolvent bank, would not be subject to the defenses against enforcement of the notes when the defenses did not appear in the bank's records. Crist argues that, just as defenses against enforcement of a note would not be valid against the FDIC, defenses against enforcement of the unlawful insurance policies should not be valid against Crist, acting as receiver for Transit.

Even ignoring the obvious flaws in Crist's argument, such as the fact that the *D'Oench* doctrine applies only to defenses that are hidden from the FDIC, and not to defenses which are plainly revealed by the documents held by the

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[5]Crist's standing to assert this argument in his Petition for Certiorari is questionable. Crist, acting as receiver for Transit and appellee in the action below, did not raise the *D'Oench* shield defense before the Eighth Circuit. Instead, Crist sought and, over objection, obtained leave to also submit a separate amicus brief in his capacity as director of the Missouri Department of Insurance. He addressed this shield defense only in this "amicus" capacity. As the appellee before the Court of Appeals, Crist did not even address the issue until his motion for rehearing and rehearing en banc following issuance of the Eighth Circuit's decision.

institution,[6] Crist simply fails to show any Arkansas authority for his assertion that *D'Oench* should be or would be first extended outside the law of negotiable instruments and then accepted into the law of Arkansas. Contrary to Crist's assertions, *D'Oench* has not been extended beyond financial institutions, and, indeed, some courts have questioned whether the FDIC itself can invoke the *D'Oench* doctrine, as codified in 12 U.S.C. § 1823(e), when the FDIC is acting as a receiver of a failed bank, rather than as a holder of notes as it was in *D'Oench*. *E.g.*, *Jones v. Federal Deposit Ins. Corp.*, 151 Ga. App. 619, 260 S.E.2d 751 (1979) (refusing to apply the codified version of the *D'Oench* doctrine to the FDIC acting as receiver); *see Federal Deposit Ins. Corp. v. Vogel*, 437 F.Supp. 660, 663 (E.D. Wisc. 1977).

Moreover, those cases in which the *D'Oench* doctrine has been extended to financial institutions other than the FDIC acting as a holder of a note have invariably involved the application of federal common law. *See Firstsouth, F.A. v. Aqua Const. Inc.*, 858 F.2d 441 (8th Cir. 1988) (extending the *D'Oench* doctrine to the Federal Savings and Loan Insurance Corporation under federal common law). The only case on which Crist relies to support his assertion that the policies underlying the *D'Oench* doctrine have "long been applied in the insurance industry" is from Texas

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[6]Here, for example, the premium agreement between Transit and Wal-Mart was reflected in a cover note and binder. (Pet. App. 6a). Crist's assertion that this was solely an "oral agreement" (Pet. App. 8) is false; the premium agreement was in writing and discoverable by the insurance regulators had they examined Transit's files.

— a jurisdiction whose law on this issue is not relevant here. (*See* Pet. App. 13).[7]

The Eighth Circuit held that Transit's receiver failed to persuade the court that the Arkansas courts would extend the *D'Oench* doctrine beyond the confines of the banking industry. (Pet. App. 21a, n.11). In the face of the flatly contrary precedent under Arkansas state law, the Eighth Circuit properly refused to extend the *D'Oench* doctrine to shield Crist from Transit's guilt.

## III.

### No National Concerns Are Raised By The Eighth Circuit's Application Of The Arkansas In Pari Delicto Doctrine

Throughout his Petition, Crist attempts to create the impression that the state law issues in this case are of national importance. He asserts that the Eighth Circuit's decision disrupts the "uniform" regulation of workers compensation insurance in the fifty states, leaves insurance regulators with no means of enforcing workers compensation regulations, and leaves Wal-Mart in a position of having "avoided paying its statutory premium," "avoided paying its injured workers," and "profiting at the expense of guarantee funds across the country."

Crist's hyperbolic allegations are not only groundless but are, indeed, directly contrary to the facts. Crist's repeated assertion that workers compensation insurance is

[7]Crist is apparently attempting to persuade this Court to review an alleged conflict between the law of different states, namely Arkansas and Texas, as to whether receivers of failed companies should be held responsible for the acts of the companies. This Court does not, of course, grant certiorari to resolve permissible differences of opinion among state courts, each interpreting its own state's laws. *See Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938).

uniformly regulated is contradicted by the regulations themselves. States vary greatly in the degree to which they regulate workers compensation insurance and, as noted by the Eighth Circuit, many states were moving towards deregulation of workers compensation insurance during the years that the policies were negotiated between Transit and Wal-Mart. (Pet. App. 14a, n.5).

The Eighth Circuit's decision does not disrupt the regulation of workers compensation insurance among the states, but in fact encourages adherence to the regulations by insurance companies. By prohibiting Transit's receiver from profiting from Transit's violation of the regulations, the Eighth Circuit sent the insurance industry a much needed warning that insurers cannot continue to promise insurance premiums they never intend to justify. As the Eighth Circuit concluded, "application of the doctrine here would work to discourage insurers from permitting agents to quote premiums and structure policies in violation of state insurance regulations." (Pet. App. 22a).

Crist's passionate argument that, as a result of the Eighth Circuit's holding, regulators have no means of enforcing their regulations, is also without basis. This case concerns only an interpretation of Arkansas law in a situation where a receiver, who also was an insurance regulator, continued to pursue an action on behalf of the insolvent insurance company against the insured. The ability of the insurance regulators to police the insurance industry itself remains unaffected by the Eighth Circuit's decision.

Finally, Crist's repeated accusations that Wal-Mart is somehow improperly benefiting from the Eighth Circuit's decision are both false and irresponsible. Wal-Mart paid $7 million to Transit for its two years of insurance coverage —

an amount which the Eighth Circuit noted was fair and reasonable at the time the premium agreement was reached. (*See* Pet. App. 11a-12a). Further, no injured worker has gone unpaid and Wal-Mart has not taken any advantage of state guarantee funds. These state guarantee funds are set up and funded by the insurance industry to provide for eventualities such as this — when an insurance company, like Transit, offers numerous insureds more than it can deliver.[8] Here, Transit promised Wal-Mart that it would provide Wal-Mart with needed insurance coverage for $3.5 million a year, but Transit did not deliver.

This case involves an isolated issue of Arkansas law applied to a unique set of facts. Transit's receiver cannot transform this issue into one of national significance by making unsupported assertions. Crist fails to raise any issue of merit in his Petition.

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[8]Crist's assertion that the state guarantee funds are harmed by the decision of the Eighth Circuit is more than slightly disingenuous in light of the fact that these same guarantee funds are now suing Wal-Mart across the country, in their own state courts under the different laws of each of their own states, seeking to recover amounts that the funds paid on Transit's behalf.

## CONCLUSION

The Court of Appeals decided this case on a matter of Arkansas state law, in accord with Arkansas precedent. In his Petition, Transit's receiver Crist does not contend otherwise. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: February 27, 1989